ONTARIO TRADE STUDIES #2

DISPUTE SETTLEMENT MECHANISMS IN A FREE TRADE AGREEMENT

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CANADA-U.S. TRADE RELATIONS:

THE DISPUTE RESOLUTION PROBLEM

1. INTRODUCTION

A discussion of institutions and procedures for the resolution and Prevention of Canada-U.S. trade disputes focuses, of necessity, on only one component of the multi-faceted legal or constitutional framework that governs bilateral economic relations. The legal character of trade disputes derives from the existence of an elaborate set of international rules created through the negotiation of multilateral and bilateral treaties. The legal cornerstone of Canada-U.S. trade relations is the General Agreement on Tariffs and Trade (GATT) which regulates national laws and policies that restrict or distort international trade in goods. In recent years, officials and citizens on both sides of the border have criticized what they perceive to be weaknesses and gaps in the GATT legal framework. The most frequently voiced complaint is that Canada-U.S. trade relations have become too volatile and unpredictable under the GATT regime. Access to both national markets has grown increasingly uncertain due to the apparently arbitrary ways in which trade laws are applied and administered by national officials. The GATT's dispute settlement procedure is often identified as a significant cause of this recent deterioration in bilateral trade relations.

The analysis presented in this paper proceeds from the Premise that the GATT dispute settlement mechanisms, if they are in fact deficient, can at most constitute only one half of the problem with the existing legal framework for bilateral trade. Improvements in the predictability of government interventions will only be achieved through the negotiation of more certain and objective rules of national conduct in conjunction with appropriate reforms in dispute resolution procedures. This interdependence between the negotiated extension and elaboration of treaty rules and the evolution of more predictable arrangements for dispute resolution is the unifying theme which structures the arguments and ideas discussed in the paper. The first part identifies the legal and political difficulties that are likely to be encountered in any bilateral initiative to formulate a new set of rules for trans-border trade. The second part analyzes the legal history of Canada-U.S. trade disputes and also presents some comparative experience from European trading arrangements. The last part attempts to identify the dominant factors which should be taken into account in evaluating alternative arrangements for settling bilateral conflicts.

2. THE PROVINCIAL INTEREST

During the postwar era, Canada and the United States have achieved substantial success in reducing the tariffs and simplifying customs procedures through multilateral negotiations conducted under the authority of the GATT. But as tariff and related border measures have declined in economic importance, a new category of trade restriction has arisen to take their place. Current Canada-U.S. trade relations mainly concern conflicts over so called "non-tariff barriers" or "NTB's". These faintly pejorative expressions are often applied to virtually all tax and regulatory laws, no matter what the level of government, and to all public expenditures which either stimulate exports or restrict imports.

NTB's and the Provinces

The shift in the focus of trade relations from tariffs to non-tariff barriers has created a need for far greater involvement by the provincial governments in bilateral trade diplomacy.

The Constitution Act of 1867 divides up between levels of government the responsibility for the broad range of policies that affect trade, giving a large role to the provinces. One thinks, for example, of provincial programs and regulations to support agriculture, control the exploitation of natural resources, and promote the economic development of disadvantaged regions and localities.

Wide-ranging provincial responsibilities in economic and social fields have drawn Ontario and the other provinces into an increasing number of bilateral disputes, sparked particularly by complaints from U.S. exporters of discriminatory treatment. For example, provincial procurement preferences are frequently labelled NTB's because, it is said, they discriminate against imports.

Government loans and grants to local industries are also condemned when they increase exports or reduce imports, regardless of the public purposes and human needs served by such programs. A third example is provincial health and safety regulations for consumer products which have frequently been the source of U.S. complaints of unfair treatment.

Bilateral trade disputes involving a wide range of industrial and agricultural products have severely affected almost all provinces. Products recently affected include wood products, steel, wheat, hogs and fish. Legal challenges from U.S. industries have threatened jobs and investment in every region of the country. Future Canadian prosperity and growth depend, at least in part, on improving our methods of both avoiding and settling Canada-U.S. trade disputes.

Provincial officials need to discuss methods of assisting the federal government in resolving bilateral disputes over NTB's, including the question of the appropriate role for provincial and private sector representatives. This matter takes on even greater urgency in light of a possible Canada-U.S. trade treaty, which could and should address the critical problem of designing appropriate mechanisms for resolving disputes concerning non-tariff barriers.

The Nature of Bilateral Trade Disputes

Disputes involving NTB's raise complex issues which are more difficult to resolve than the traditional conflicts over tariffs and related border measures. These disputes have certain common characteristics relevant to the design of fair and effective processes for their resolution.

First, disputes over NTB's almost always generate serious Political controversy because they arise from differing value judgments about the proper role for government involvement in economic affairs. Second, due to the geographical specialization of Canada's exporting industries, virtually all conflicts over NTB's affect some regions and localities much more significantly than others. Third, NTB's that adversely affect bilateral trade are very difficult to control through the negotiation of new treaty rules. Officials charged with both administering the rules and with dispute settlement must strike a balance between competing values and political interests.

Example: Disputes About Public Expenditures

On both sides of the border, there are often complaints of "unfair competition" from imported goods whose producers benefit from economic and social programs. The benefits of some public expenditures such as investments in education, public utilities, roads, etc. are thinly and widely spread among national regions, industries and individuals. But many programs are directed toward specific industries and firms, and are linked to particular economic objectives, such as the maintenance of employment in declining industries, the attraction of new investment to the production of technologically-sophisticated goods and services, or the development of export-oriented firms and industries.

Current disputes over programs like these are partly based on conflicting views concerning the appropriate role of government in economic development, but they also arise from mistakes and misconceptions about the real impact of public expenditures. In Canada, subsidies often take the form of direct grants to specific firms or industries, while U.S. governments use more indirect and less visible means -- for example, tax credits and deductions, the provision of tax exempt municipal bonds for local development projects, and huge defense expenditures which generate new commercial technologies. As one example, a recent article in the Washington Post estimated that from 1978-85 the Government of Massachusetts provided some $3 billion in below-market-rate loans through the issuance of tax-exempt industrial development bonds on behalf of approximately 300 private firms.[1]

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1 "Massachusetts Economic Boom Primed by Government Subsidies", Washington Post, Feb. 10, 1986, p. A-9.

Even indirect forms of assistance by provincial governments are usually highly visible as public aid to the private sector in the public interest. To give one instance, the Government of Ontario has followed a long-standing and well-known policy of granting concessional rates on hydro-electric power to new industrial projects, and the Government of Alberta pursues similar development goals through its jurisdiction over the pricing of oil and gas sold for consumption within that province.

Countervail as a Strategic Weapon

Since the financial benefits advanced by U.S. governments are indirect and more diffusely spread across firms and industries, it is easy for U.S. officials to downplay their true economic significance while vociferously criticizing "unfair subsidies" to Canadian exports. Canada's more direct and visible forms of public aid are easily targeted for attack by U.S. competitors. U.S. producers of fish, wood products, urban transit equipment and pork products, to name only a few, have initiated major countervailing duty actions against Canadian exporters during the 1980's.

The U.S. is the only major trading nation which makes extensive use of its countervailing duty law. Between 1980 and 1983 Japan launched only one countervailing duty action, while the European Community started six, and Canada and Australia initiated eight each. In the same period, 123 U.S. countervailing duty actions were brought. In the recent pork countervailing duty case, the U.S. Commerce Department determined that Canadian agricultural price support programs constitute "subsidies" under U.S. law. Other U.S. investigations in countervailing duty cases have involved, for example, unemployment insurance payments in the East Coast fishing industry, regional development assistance grants to manufacturing firms, fishing boat construction loans, rates charged by the Canadian National Railways, and the prices charged to private lumber companies for standing timber owned by provincial governments.

Example: Divergent Views on Consumer Protection

The 1985 ban on Canadian pork by four Mid-Western governors provides another example of the difficult factual and legal issues that are often the focal point of bilateral trade disputes.

Canadian pork was banned on the ground that Canadian farmers give their hogs certain types of antibiotics. Health experts have advanced conflicting opinions on the risks attributable to these drugs, which several inconclusive research studies have identified as possible carcinogenic agents. No other states, nor any provincial or federal governments, have banned the use of these drugs by pork producers. Yet the Mid-Western governments that adopted the pork quarantine insisted that the ban was a legitimate health safeguard, and as elected representatives they alone should determine acceptable levels of risk for food products destined for consumption by their citizens.

The pork dispute was further complicated by the fact that the four states which imposed the ban contain large and politically influential agricultural industries that have recently been hard pressed by low-priced imports of Canadian pork. Considering the circumstances surrounding the quarantine, Canadian producers view these health regulations as a pretext or ruse employed only for the purpose of providing protection to Mid-Western American farmers.

Example: Differing Approaches to Economic Change

A third illustration of the difficult policy issues that arise in the course of bilateral trade disputes is the problem of trans-border safeguard actions.

When low-priced imports take away business from domestic competitors, governments must decide whether to impose tariffs or quotas to lessen the competitive pressure, or to use other policy instruments to assist workers and investors in adjusting to the resulting dislocation and social costs from the decline of the domestic industry. Article XIX of the General Agreement on Tariffs and Trade authorizes governments to deploy protective barriers against imported products that cause "serious injury" to a domestic industry.

The Reagan administration recently imposed a 35% tariff on cedar shakes and shingles from British Columbia, in order to safeguard U.S. producers of these products from Canadian imports. While the action was permissible under the GATT, many observers on both sides of the border have argued that U.S. workers in the cedar shake and shingle industry would have been better served by adjustment assistance and retraining programs rather than tariff protection from imports. Higher tariffs do not address the economic problems that have caused the U.S. industry's rapid decline in recent years, but rather postpone the search for constructive solutions. This same point can be made about several other Canadian and U.S. industries which have been forced to discharge workers and close plants as a result of intensifying import competition such as textiles and footwear.

(While Article XIX of the GATT provides a useful model, it will be difficult for Canada and the United States to negotiate workable standards to regulate the use of safeguard measures under a bilateral trade agreement. When Canadian or U.S. industries seek safeguard protection as a consequence of the bargained reduction of bilateral trade barriers, what quantum or degree of commercial injury and economic dislocation should they be required to demonstrate in order to obtain tariff or quota relief? The "serious injury" standard of GATT Article XIX has not acquired any objective or determinate meaning in the relatively few GATT cases that have addressed the issue. The creation of a more predictable legal framework for bilateral trade will require more refined and concrete tests for the economic circumstances which justify safeguard measures. Efforts to formulate such tests in the context of bilateral negotiations are likely to succeed only if the two contracting parties are able to achieve a real consensus on the appropriate role of government in shaping the pace and direction of industrial change.)

Some General Lessons

It is virtually impossible to design concrete rules for the resolution of bilateral disputes such as we have described without allowing for some measure of value judgment by (the administering) officials.

What degree of economic dislocation for workers and investors is "serious" or "material" enough to justify safeguard protection? What is the maximum acceptable level of risk when the health of consumers is at stake? The citizens of democratically-elected governments are accustomed to having these difficult questions resolved in the legislature or executive branch, not by international, or even bilateral, bodies meeting in distant capitals.

Current proposals from Ottawa for broad "national treatment" provisions as the centerpiece of a Canada-U.S. free trade agreement do not avoid difficult subjective questions. What is "discriminatory treatment"? Are Canadian farmers victims of discriminatory treatment when their pork is excluded by a quarantine that is apparently motivated by concern for the health of U.S. consumers? The officials charged with answering this question in the course of interpreting a treaty would be required to investigate the policy motives, and the good faith, of elected governments.

A Canada-U.S. free trade agreement requiring equal treatment of imports would leave many crucial interpretive issues unresolved. A less ambitious agreement that attempted to carve out large exceptions to the non-discrimination regime (which seems the more likely outcome) would create an additional layer of complexity: officials interpreting the agreement would be required constantly to determine the scope and range of its intended application. These jurisdictional issues (i.e., is unemployment insurance compensation within the scope of the treaty's rules governing subsidies? Must income and consumption taxes be made more uniform?) would not be easily or quickly resolved.

A Canada-U.S. free trade area of comprehensive application would hold the prospect of painful, and to a large extent, irreversible adjustments for Canadian workers and investors. Many individuals would be required to stake their livelihoods on the durability and effectiveness of the market access guarantees created by the treaty. The most important determinant of such a treaty's future success would be the legal arrangements for applying and interpreting the agreement. The next section describes three basic options for designing a legal framework to resolve the many disputes that are certain to continue, whether bilateral relations continue to be conducted under the GATT framework, or some new, and as yet unspecified, form of regional trading arrangement.

3. MODELS FOR THE RESOLUTION OF TRADE DISPUTES

A review of the legal history of both trade and non-commercial diplomacy among the developed industrial economies of North America and Western Europe reveals three distinct approaches to dispute settlement -- Conciliation, Conciliation Plus Binding Arbitration, and Joint Institutions.

Conciliation

Conciliation was the earliest method for settling trade conflicts and continues to be the most frequently used approach.

Conciliation is usually conducted exclusively by the central or national governments: they initiate the process, and (also) determine the additional parties who will be allowed to participate in the proceedings. The conciliation process is invariably based on an explicit treaty provision obligating signatories to bargain "in good faith". But a conciliation procedure imposes no obligation to take steps necessary to achieve a binding settlement.

To assist the disputants, many modern trade treaties require mediation. Most commonly, there is provision for an impartial panel or working party to investigate the facts and make recommendations for compromise. The GATT employs this form of mediated conciliation. More than 100 panel proceedings have been conducted over the past 35 years under the GATT's conciliation process. In almost all of these disputes, GATT conciliation and mediation have achieved workable settlements.

All existing free trade area agreements (i.e., the European Free Trade Association Convention (EFTA), the Israel-U.S. Free Trade Agreement, the Australia-New Zealand Closer Economic Relations Trade Agreement and the Anglo-Irish Free Trade Agreement) rely exclusively on conciliation and mediation procedures to resolve interpretive disputes.

Because consultation and bargaining are traditional forms of diplomacy between nations, no special institution is needed for these activities; The Anglo-Irish and Australia-New Zealand agreements rely exclusively on ad hoc intergovernmental meetings. Alternatively, such official interaction may be formalized within a joint committee of representatives of the national governments, as in the Israel-U.S. and EFTA Agreements.

Outside commercial diplomacy, the International Joint Commission (IJC) established by the 1909 Canada-U.S. Boundary Waters Treaty has played an important role in the conciliation of disputes relating to boundary delineation, and trans-border air and water pollution. The Commission consists of six members -- three from each country. It performs its mediation role through a process of joint studies and investigations involving fact-finding, analysis and recommendations to the two sides. In the more than 100 cases referred to it from 1912 to date, the IJC has produced unanimous reports in all but four cases. The vast majority of its non-binding recommendations have been accepted and implemented by the governments either in whole or in part.

Conciliation Plus Binding Arbitration

Conciliation plus binding arbitration has been employed on five occasions during the 20th Century to resolve disputes between the U.S. and Canada; none of these conflicts involved trade or related commercial issues.

The first occasion was the ill-fated Alaska Boundary Arbitration of 1903 which confirmed the claim of the U.S. government to an unbroken strip of coastland north of latitude 54° 40'. The U.S. victory aroused heated controversy in Canada. The second was the "I'm Alone" Arbitration which arose out of the sinking of a Canadian vessel by the U.S. Coast Guard beyond the 200 mile border. Canada's claim was upheld and the injured parties were awarded compensation.

The third case was the Trail Smelter Arbitration, a unanimous award in favor of residents of the State of Washington who were damaged by sulphur emissions from the Trail Smelter in British Columbia. Fourth was the Gut Dam Arbitration of 1953 which held Canada responsible for damage suffered by U.S. citizens when their property was flooded as a result of the construction of the Gut Dam on the Great Lakes. The most recent (1984) Canada-U.S. arbitration involved the Gulf of Maine maritime boundary dispute in which a Panel of the International Court of Justice upheld most of Canada's major substantive claims.

The arbitral form of settlement procedure usually begins with a conciliation process, which may or may not require mediation. If conciliation fails, any signatory can invoke its right, expressly provided for in the governing treaty, to compel the creation of an impartial arbitral panel with authority to conduct an investigation, hear the evidence and legal arguments submitted by the disputants, make findings of fact and conclusions of law, and issue a legally binding directive of the remedial action (if any) to be taken.

It is customary that arbitral panels be composed of either three or five members. Some treaties require that none of the members be citizens or residents of the disputants. In others, a majority of the panel are required to be nationals of the disputant's, but their numbers must be evenly balanced and there must also be an impartial third or fifth member with the power to break deadlocks by a casting vote. Invariably, the most contentious issue in international arbitrations is the selection of the impartial third or fifth arbitrator.

The recent Report of the Royal Commission on the Economic Union and Canada's Economic Development Prospects (the "Macdonald Commission") proposed the inclusion of conciliation plus binding arbitration in any future framework agreement aimed at the liberalization of bilateral trade.

Joint Institutions

Joint institutions are the most recent legal innovation in techniques for the settlement of trade disputes among sovereign nations.

In many respects this arrangement is similar to various forms of federal government. The best known example is in the Treaty of Rome which created the European Economic Community (EC) -- an economic union aimed at promoting the free flow of goods, services, capital and people among its member nations. The EC treaty creates four joint institutions -- a Council, a Commission, a Court, and a Parliament.

Most trade disputes between EC member nations are resolved in the Council, where each member has one vote. But since each member also has an effective veto over any Council measure which threatens overriding national interests, disputes occasionally result in prolonged deadlocks. When deadlocks occur, either the Council or the Commission, which is the Council's administrative and enforcement agency, can invoke the jurisdiction of the Court of Justice. The Court, a standing judicial body of nine members appointed by the Council, has the power to issue binding directives in any dispute involving rights and duties arising under the Treaty. The Court's jurisdiction can also be invoked by member governments, sub-national governments, private firms and individuals.

The most striking characteristic of joint institutions is that they mitigate the central government's long-standing legal monopoly over the conduct of external trade relations, including dispute settlement. Moreover, the joint institutions approach need not embrace courts or arbitral bodies with legally-binding remedial powers. The International Joint Commission is a well-established Canada-U.S. joint institution, and provincial and private sector representatives have frequently participated in IJC proceedings.

4. WAYS TO RESOLVE DISPUTES -- THE TRADE-OFFS

An open debate on the most desirable approach for resolving bilateral trade disputes should proceed from an understanding of the key considerations, and how competing policy objectives might be balanced against one another. Three basic criteria or factors should be used to evaluate institutions for the resolution of trade disputes: Enforceability, Political Flexibility and Participation.

A. ENFORCEABILITY

The U.S. Failure To Respect Trade Obligations

The rules of international trade law contained in the GATT are qualitatively different from domestic law rules because of the absence of any impartial authority with coercive power to find and punish offenders. While U.S. governments have generally used their best efforts to live up to treaty obligations, there have been a number of recent instances in which the Congress has refused to enact legislation to bring U.S. federal law into conformity with the clear requirements of valid trade agreements. For example, the existing "foreign sales corporation" provisions of the U.S. Internal Revenue Code are virtually carbon copies of the "domestic international sales corporation" statute that a GATT panel found to be in violation of that treaty's requirements almost 10 years ago. Moreover, U.S. countervailing duty law has never been amended to conform to the standards of the GATT Subsidies Code, signed by the Carter Administration in 1979.

In light of these difficulties with the effectiveness of international law, it might well be asked: What value has the resolution of a dispute if the resolution cannot be enforced? This frequently expressed criticism of conciliation and mediation techniques is one-sided and misleading because it abstracts from the subject-matter and the diplomatic context of particular trade disputes. When the dispute concerns the interpretation of treaty language, it may often be the case that the parties who negotiated the agreement employed broad and vague terminology because they could not agree on how specific types of problems should be handled. Moreover, the negotiators of trade agreements are rarely favored with perfect foresight. Unforeseen changes in commercial or political circumstances will sometimes justify departures from the literal requirements of treaty language. To take existing free trade agreements as an example, it is generally observable that the more complex and politically controversial issues dealt with by a particular agreement, the more likely the dispute resolution mechanism is to emphasize political flexibility at the expense of enforceability.

The GATT and Enforceability

The diplomatic context of a dispute resolution mechanism should also be considered in any assessment of its effectiveness. The great advantage to Canada of the General Agreement on Tariffs and Trade is the opportunity for strategic alliances presented by multi-national diplomatic negotiations. In the various GATT "rounds" -- and a new round will begin shortly -- Canada can forge various cooperative relationships and make complicated trade-offs to enhance its position. What can be accomplished is a function, not just of political power and economic strength, but also of negotiating skill.

These diplomatic advantages, which have led to the Progressive elaboration of the GATT's rules and subject-matter coverage, should be taken into account when one looks at the treaty's mechanism for resolving disputes. GATT panels have tended to view their role as one of pure conciliation. Panels often decline to enter findings of fact in disputes over the economic consequences of non-tariff measures -- for example, whether an industry has suffered "material injury". Such deference to national decision-makers is primarily attributable to the vagueness and subjectivity of many of the GATT's legal standards, which in turn results from a lack of consensus among the agreement's 92 signatories. After forty years, the most controversial concepts such as "serious injury" and "subsidy" have no generally-accepted GATT definition.

Enforceability also incorporates the idea of effective remedies for non-compliance with trade rules. Conciliation and mediation fail to provide any meaningful collective sanction for non-compliance. Unilateral retaliation or self-help must be used by an aggrieved state. It is clear, for example, that the GATT non-discrimination regime has not protected Japan, the newly industrializing countries, and many other developing countries, from quotas and voluntary export restraints levied against their manufactured products in Western Europe and North America.

These criticisms of the GATT dispute resolution mechanism in no way reflect on the value to Canada of the GATT negotiating process.

Binding Arbitration

Canadian proponents of binding arbitration, such as the Macdonald Commission, argue that a more coercive legal framework for economic relations is to Canada's advantage, particularly when it comes to the United States. It is argued that we need more certainty and predictability of export market access than can be achieved under the GATT system. Canada's economic dependence on the enormously powerful U.S., which dependency the proposed free-trade arrangement would increase, suggests that dispute resolution procedures between the two countries should be designed to offset the disparity in bargaining power. Trade agreements with the U.S. must not be applied or administered with a bias towards the interests of the stronger party.

This argument in favor of arbitration or adjudication probably exaggerates the actual degree of certainty and predictability that could be achieved as a result of a legally-binding mechanism for dispute resolution. The power to issue binding directives should be distinguished from the real power to compel compliance. National governments often resist the commands of arbitral tribunals and trans-national courts. In the face of resolute defiance or prolonged foot-dragging, the only effective remedy is the same one available at the conclusion of conciliation procedures -- unilateral retaliation.

B. POLITICAL FLEXIBILITY

Political flexibility is often given as the principal objection to enforceable dispute resolution mechanisms. Binding arbitration and, to an even greater extent, joint institutions, require the surrender of political responsibility to non-elected and non-accountable decision-makers. Most difficult trade disputes involve the livelihoods of individuals and the economic prosperity of particular regions. They may also involve public expenditure programs, tax policies or other volatile political issues. What elected official is anxious or even prepared to relinquish his rightful responsibility for such matters?

The examples of current bilateral trade disputes discussed earlier in the paper illustrate the basic tradeoffs between enforceability and political flexibility. A bilateral tribunal with the authority to decide that specific public expenditures constitute "unfair" or "unreasonably disruptive" subsidies might improve the short-term predictability of trade relations, but only at serious risk to the political acceptability and long-run effectiveness of such an arrangement.

Opponents of enforceable forms of dispute resolution -- binding arbitration and joint institutions -- also dislike the expense, delays and uncertainty inherent in relying on "impartial" appointees for example, appointees from other jurisdictions.

Finally, an argument which derives from a concern over maintaining political flexibility is that a legalistic dispute settlement procedure cannot serve as a substitute for imaginative diplomacy and political wisdom in resolving bilateral trade conflicts. Over twenty years of experience with the Canada-U.S. Auto-Pact demonstrates that the effective settlement of most substantial trade conflicts necessitates the continued involvement of elected officials at the highest levels. Complex and controversial decisions which impact directly on the economic welfare of countless families and individuals, such as those that have arisen under the Auto-Pact, cannot be easily delegated to non-accountable arbitrators or judges.

C. PARTICIPATION

Participation by all the various interests affected by a particular trade dispute is often absent from the conciliation and binding arbitration forms of dispute settlement. But joint institutions that are autonomous from direct control by member governments would encourage provinces and states, firms, organizations and even private individuals to initiate and participate directly in the settlement of trade disputes. Allowing firms and individuals whose economic futures are on the line a fair opportunity to participate can be justified by reference to widely-shared notions of political fairness.

When bilateral disputes engage such vital interests, provincial governments and private sector organizations should play some meaningful role in their settlement. As one example, if a dispute arose concerning the Nova Scotia steel industry, shouldn't the government of that province have a role in selecting the members of an arbitration or conciliation panel?

Permitting more frequent and extensive participation by provincial governments and private individuals would not require any significant trade-offs in regard to enforceability and political flexibility. Enhanced participation might be accommodated within a conciliation/mediation framework, as with the IJC. Alternatively, expanded opportunities for provincial and private sector representation could be provided in the context of an arbitral mechanism or some other binding form of adjudication.

5. CONCLUSIONS

The design of appropriate institutions for resolving bilateral disputes over non-tariff barriers will require controversial choices involving competing considerations. A desire for more certain and predictable access to the U.S. market for Canadian exporters has led many commentators to emphasize the value of legal enforceability in the choice of dispute settlement mechanisms. Others have stressed the importance of maintaining the political flexibility of both levels of Canadian government, and have therefore resisted proposals for more legalistic or judicial approaches to resolving bilateral trade disputes. Thus, the key issue is whether Canadians will accept a degree of unpredictability in their trading relationships with the U.S. in order to preserve the political flexibility of our democratic governments, or whether they are willing to relinquish some freedom of policy choice in order to achieve more control over the actions of our major trading partner. No matter how the balance is struck, there is a clear need for enhanced participation by the provinces and private sector in the management of bilateral trade conflicts.